UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY

and

JOANNA GAMBLE, an Individual.

CASE NO. 19-CA-089374

EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE FILED BY THE BOEING COMPANY

Charles N. Eberhardt
William B. Stafford
Amy Kunkel-Patterson
PERKINS COIE LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004
Attorneys for The Boeing Company

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY

and

JOANNA GAMBLE,

an individual.

EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE FILED BY THE BOEING COMPANY

Case No. 19-CA-089374

The Boeing Company ("Boeing") files the following exceptions to the Decision of Administrative Law Judge Jeffrey D. Wedekind in this matter, dated July 26, 2013 (the "Decision"):

- 1. **Finding** that the Complaint in this case is not *ultra vires* and may be lawfully processed notwithstanding the National Labor Relations Board's lack of a valid quorum. Decision at 2 n.3. This finding is actually a conclusion and is contrary to law.
- Prohibition Against Retaliation form (the "old Notice") "to prohibit employee witnesses from discussing ongoing HR investigations with other employees violated Section 8(a)(1) of the Act, as alleged." Decision at 3:34-36. There is insufficient evidence to support this finding. SOF ¶ 11; Ex. E. To the extent this finding states a conclusion of law, it is contrary to law.
- 3. **Conclusion of Law** that, "[b]y maintaining and routinely distributing [the old Notice] to employees involved in HR investigations," Boeing "engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act." Decision at 9:23. For the reasons stated above, there is insufficient evidence to support this conclusion, and it is contrary to law.

¹ This case was submitted on a stipulated record. Stipulated facts set forth in the parties' Joint Motion and Stipulation of Facts are cited as "SOF ¶ [number]." Stipulated exhibits attached to the Joint Motion and Stipulation of Facts are cited as "Ex. [number]."

- 4. **Finding** that the anti-retaliation terms of the revised Notice of Confidentiality and Prohibition Against Harassment form (the "Revised Notice"), including the name and the entire fourth paragraph of the Revised Notice, are not "relevant" to this dispute. Decision at 4:1-23. There is insufficient evidence to support this finding. SOF ¶ 12; Ex. F. To the extent this finding states a conclusion of law, it is contrary to law.
- Finding that "[t]he Company argues that, by substituting 'recommend' for 'directed,' the revised confidentiality notice has cured any arguable deficiencies in the original notice." Decision at 4:30-31. This finding contradicts the record.

 Respondent's Brief on Stipulated Record, at 12-16.
- 6. **Finding** that "the General Counsel has the better argument under extant law" with respect to the Revised Notice. Decision at 4:39. This finding is a conclusion of law and is contrary to law.
- 7. **Finding** that the Revised Notice should be treated as a coercive "request" for purposes of Board law. Decision at 4:40-43. There is insufficient evidence to support this finding. SOF ¶ 12; Ex. F. To the extent this finding states a conclusion of law, it is contrary to law.
- 8. **Finding** that "nothing in the revised notice can reasonably be interpreted as an assurance to employees that they are nevertheless 'free' to disregard the Company's recommendation/request and 'discuss the case if he or she chooses to do so." Decision at 5:4-7. There is insufficient evidence to support this finding. SOF ¶ 12; Ex. F.
- 9. **Finding** that "the second sentence of the second paragraph" of the Revised Notice does not support the conclusion that, when the Revised Notice is read as a whole and the terms challenged in the Complaint are placed in context, no reasonable employee would interpret it as prohibiting discussion of ongoing investigations, and finding specifically that the sentence cannot be read to authorize witnesses to

- disclose information "on a need to know basis." Decision at 5 n.6. There is insufficient evidence to support this finding. SOF \P 12; Ex. F.
- 10. **Finding** that "the fourth and last paragraph" of the Revised Notice does not support the conclusion that, when the Revised Notice is read as a whole and the terms challenged in the Complaint are placed in context, no reasonable employee would interpret it as prohibiting discussion of ongoing investigations. Decision at 5 n.6. There is insufficient evidence to support this finding. SOF ¶ 12; Ex. F.
- 11. **Finding** that the Revised Notice "would have a reasonable tendency to chill employees from exercising their statutory rights." Decision at 5:10-11. There is insufficient evidence to support this finding. SOF ¶ 12; Ex. F.
- 12. **Finding** that Boeing's "routine use of the [Revised Notice] in ongoing HR investigations since November 2012 . . . violated Section 8(a)(1) of the Act, as alleged." Decision at 5:21-23. There is insufficient evidence to support this finding. SOF ¶ 12; Ex. F. To the extent this finding states a conclusion of law, it is contrary to law.
- 13. **Finding** that Boeing "has continued to routinely require employee witnesses in HR investigations to sign a revised confidentiality notice that is just as unlawful as the original under prevailing Board law." Decision at 9:16-18. There is insufficient evidence to support this finding. SOF ¶¶ 11, 12; Exs. E, F. To the extent this finding states a conclusion of law, it is contrary to law.
- 14. **Conclusion of Law** that, "[b]y maintaining and routinely distributing [the Revised Notice] to employees involved in HR investigations," Boeing "engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act." Decision at 9:23. For the reasons stated above, there is insufficient evidence to support this conclusion, and it is contrary to law.

- 15. **Finding** that the written warning issued to Ms. Gamble could "'chill' other employees from engaging in concerted protected activity" and "the Company does not contend otherwise." Decision at 8:14-16, 21-22. There is insufficient evidence to support this finding, which contradicts the record. SOF ¶¶ 31-34; Exs. Q, R; Respondent's Brief on Stipulated Record, at 18-20.
- 16. **Finding** that "a preponderance of the evidence establishes that the Company was, in fact, sufficiently aware of the concerted nature of Gamble's admitted post-investigation communications." Decision at 8:35-37. There is insufficient evidence to support this finding. SOF ¶¶ 25-31; Exs. K-P.
- Finding that "Stroscheim's July 9 email to Sanchez" erased "any doubt about whether any of the four [other employees] supported Gamble's complaints."

 Decision at 8:43-46. There is insufficient evidence to support this finding.

 SOF ¶¶ 18, 20, 21, 23, 26; Exs. H, J, M.
- Finding that "the Company failed to adequately repudiate the unlawful warning."

 Decision at 9:4-5. There is insufficient evidence to support this finding.

 SOF ¶¶ 31-34; Exs. Q, R. To the extent this finding states a conclusion of law, it is contrary to law.
- 19. **Conclusion of Law** that, by issuing a written warning to Gamble on August 9, 2012, for violating terms of the old Notice, Boeing "engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act." Decision at 9:29-32. For the reasons stated above, there is insufficient evidence to support this conclusion, and it is contrary to law.
- 20. **Finding** that "the Company violated the Act as alleged." Decision at 2:5. This finding summarizes and is dependent on each of the detailed findings and conclusions of law addressed above. For the reasons stated above, there is insufficient evidence to support this finding, and it is contrary to law.

- 21. **Conclusion** that any remedy is appropriate or required. Decision at 9:36-10:3. For the reasons stated above, this conclusion is not supported by the record or law.
- 22. **Conclusion** that "a general posting remedy is appropriate." Decision at 9:42. For the reasons stated above, this conclusion is not supported by the record, nor would a general posting serve any valid remedial purpose.
- 23. **Recommendation** that the Order should be issued by the Board. Decision at 10:10-11:17. For the reasons stated above, this recommendation is not supported by the record or law, and the recommended Order is substantially overbroad and would not serve any valid remedial purposes. Without limiting the scope of this exception, Boeing also specifically notes its exception to the following recommended Order provisions:
 - a. That Boeing cease and desist from "[m]aintaining and routinely distributing or enforcing confidentiality directives, requests, and/or recommendations to employees involved in HR investigations not to discuss the case with their coworkers." Decision at 10:15-17. This recommendation is not supported by the record; is unduly vague, ambiguous, and overbroad; and would serve no valid remedial purpose.
 - b. That Boeing, "to the extent it has not already done so, revise or rescind the [old Notice]." Decision at 10:28-30. This recommendation is not supported by the record and would serve no valid remedial purpose; it is undisputed Boeing has already voluntarily taken the recommended action. SOF ¶¶ 11-13; Exs. E, F.
 - c. That Boeing, "to the extent it has not already done so, rescind the unlawful August 9, 2012 written warning it issued to employee Joanna Gamble ... and ... advise her in writing that this has been done and that the warning will not be used against her in any way." Decision at 10:32-36.

This recommendation is not supported by the record and would serve no valid remedial purpose; it is undisputed that Boeing has already voluntarily taken the recommended action. SOF ¶¶ 33-34; Exs. Q, R.

- d. That Boeing "post copies of the attached notice marked 'Appendix A' at its Renton, Washington facility." Decision at 10:38-39. This recommendation is substantially overbroad, is not supported by the record, and would serve no valid remedial purpose.
- e. That Boeing "post copies of . . . the attached notice marked 'Appendix B' at all of its facilities nationwide where its confidentiality notices have been used since March 17, 2012." Decision at 10:38-11:1. This recommendation is substantially overbroad, is not supported by the record, and would serve no valid remedial purpose.
- f. That Boeing also distribute the proposed remedial notices electronically. Decision at 11:5-7. This recommendation is substantially overbroad, cumulative, and not supported by the record, and would serve no valid remedial purpose.

DATED: August 23, 2013

PERKINS COIE LLP

Charles N. Eberhardt

William B. Stafford

Amy Kunkel-Patterson

Perkins Coie LLP

The PSE Building

10885 N.E. Fourth Street, Suite 700

Bellevue, WA 98004

(425) 635-1400

Attorneys for The Boeing Company

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE FILED BY THE BOEING COMPANY in the above-captioned matter, which is e-filed with the Board, was served electronically upon the persons shown below:

M. Anastasia Hermosillo at mary.hermosillo@nlrb.gov
Joanna Gamble at joanna.gamble@boeing.com

DATED: August 23, 2013

Debbie Coker Legal Secretary